NUREMBERG:

Justice or Revenge?

by Frederick Williams

What will be history's verdict on the so-called "War Crimes Trials" at Nuremberg in 1946? Was the verdict of these trials which sent German leaders to death and to prison terms the great democratic achievement which the free world hailed at that time? There are growing indications that fair-minded Americans are beginning to take a second glance at the wisdom and historic results of this trial of vengeance.

ANYONE who knows anything about law and justice can tell you that three fundamental requirements must be met before the trial of the worst criminal can be said to have complied with the traditional notions of justice of the Christian World. 1. The court or tribunal must have "jurisdiction" to try the case; 2. the trial itself must be "fair"; 3. and the sentence must be subject to some kind of "review" when and where necessary.

This knowledge has, in recent years, induced many thoughtful men in America to look back critically at the War Crimes Trials and similar proceedings. The developments in the last decade have eased the passions of the period following World War II, thus making room for sober reflection. Did the War Crimes Trials administer justice or revenge? Were the requirements of fair trials—jurisdiction, due process and review—complied with in the War Crimes Trials?

If we turn first to *jurisdiction* we find that it is "the right of a court to produce before it the parties involved." Generally speaking, it is of three kinds: Jurisdiction of the subject matter, jurisdiction of the parties, and jurisdiction to render the judgment which was given. When we apply these oversimplified requirements to the "jurisdiction" of the War Crimes Tribunals

we become involved in highly debatable theories of what is known as "international" law. The jurisdiction of the War Crimes Tribunals was "created" by a series of *"agreements," "declarations"* and *"executive orders"* of the heads of the four "Allied Governments" which *purported* to create jurisdiction.

Authorities on international law generally agree that so-called "conventional" war crimes, such as the murder of innocent children by soldiers, can be tried before any legally constituted court or tribunal which can bring the accused under its jurisdiction. This jurisdiction, however, depends on international conventions or agreements and is not to be confused with a codified body of law to which all nations subscribe or must subscribe. There is no such thing as international law in this sense, although there are international agreements.

Keeping in mind then that we are not dealing with the administration of any *universal* "international law" (which does not exist) but with the creation of *new law,* which purports to be "international," let us look at some of the *declarations, executive orders* and *agreements.* What did they actually say and do? The Moscow Declaration, with the familiar ring of Soviet terminology, was a " . . . full warning" to the "recoiling Hitlerite Huns" that the "aforesaid three allied powers . . ." would send "those German officers and men and members of the Nazi party who have been responsible for, or have taken part in . . . atrocities . . . to the countries in which their abominable deeds were done in order that they may be punished according to the laws of these liberated countries. . . ." The Declaration contained a further "warning":

> "Let those who have hitherto not imbrued their hands with innocent blood beware, lest they join the ranks of the guilty, for most assuredly the three Allied Powers will pursue them to the uttermost ends of the earth and will deliver them to their accusers in order that justice may be done."

LET US make a few dispassionate observations at this point: First of all, the release of the Moscow Declaration was a "full warning" indeed, because it told the Germans what "awaited" them. German propaganda exploited this threat, thus strengthening the German will to resist. This probably resulted in the loss of many American lives.

Secondly, the Declaration—despite its legal jargon—is nothing but a thinly disguised *threat of revenge,* couched for the most part in Soviet phraseology.

Thirdly, we may ask, how did the United States get involved in all this? The language of the Dec-

laration may have been English, but the spirit of *revenge* behind it, as illustrated by the terminology, certainly was not "American."

IN SHORT: A series of declarations and agreements purported to create jurisdiction to try "crimes," some of which had never been recognized as "crimes" before, for instance "crimes against peace." It is true that in the Communist world people are imprisoned or executed for "crimes against peace," but should that bind us? Furthermore, the perhaps gravest objection which has been raised to these agreements is that they produced what lawyers call *ex post facto laws,* that is, laws which make an action "done before the passing of the law and innocent when done, criminal, and punish such action." The United States Constitution forbids the passing of such laws.

Even more disturbing than the "jurisdictional" aspect of the War Crimes Trials are the "fair trial" aspects.

Annexed to the London Agreement was a Charter, Article 3 of which provided: "Neither the Tribunal, its members nor their alternates can be challenged by the prosecution, or by the defense, or by the defendants or their Counsel." This is a lawyer's way of saying: Even if the judges on the bench are highly prejudiced against you, you have no standing to complain. Article 19 read: "The Tribunal shall not be bound by technical rules of evidence." This means that important safeguards of an orderly trial which, for instance, exclude mere "hearsay" evidence, have been extinguished in a proceeding of this kind. The rules of procedure governing the trials, in other words, were clearly questionable.

Turning here to the actual conduct of the trials, I found filed in the Supreme Court on May 14th, 1948, a petition by an American Colonel defending 74 Germans, who ranked from general to private. An exhibit, attached to the petition quoted from the trial record: "Attention is drawn to the opening statement of the prosecution in which the following language was used: 'Despite the youth of these suspects, it took months of continuous interrogation in which all the . . . tricks, ruses and strategems known to investigators were employed. Among other artifices used were stool pigeons, witnesses who were not bona fida, and ceremonies.'

"The prosecution's own witness testified on direct examination as follows:

> Q. Did you use any ceremony of any kind in the interrogation . . .?
>
> A. I guess you would call it a ceremony. We used sort of a mock trial, I guess you would call it. We had whoever wasn't busy sitting in the chairs behind the

table, posing as officers hearing testimony. First, the witnesses that we had against him were brought in, and if they were bona fide witnesses, they were sworn. And the interrogator sat down at the table and took notes, or maybe he started writing the statement right then . . .

Q. Do you know whether or not the accused were confronted with witnesses who were not bona fide?

A. I know that they were.

Q. Do you know whether or not the interrogators ever raised their voices during the interrogation?

A. I am sure they did.

Q. Do you know whether or not suspects ever broke down and cried after they had confessed?

A. I saw a few, yes, sir.

Q. Did they cry silently or did they sob out loud?

A. I think out loud, sir.

Q. Do you recall other methods used for eliciting information, other than you have already described?

A. No special methods. Each interrogator had his own bag of psychological tricks, you might call it.

THE PETITION was supplemented by a 228 page review with analysis of the evidence against each of the 74 defendants. Quite aside from all the alleged legal errors, the most disturbing aspect of the case was the assertion that *the prosecution had systematically employed third-degree methods.* Secretary of the Army Royall thereupon sent a board of three officers to investigate these cases. President of the Board was Colonel Gordon Simpson, JAGC-Res., then Justice of the Supreme Court of Texas. The report concluded that it was "extremely doubtful that an American court-martial would fix any punishment more severe than life imprisonment, if it were trying members of the American Army who committed like offenses in the heat of battle." The report continued:

"Moreover, the prosecution testimony in this case was made up in large part of the extrajudicial statements of the accused. Many of these statements implicated to a damaging degree others of the accused. Admittedly, some of the statements were obtained by the use of mock trials in which one or more persons attired as American officers pretended to preside as judges and others attired in Army officers uniforms pretended to be the prosecutor and defender of the accused. The room where these proceedings were held contained a table covered with black cloth on which stood a crucifix and burning candles. The accused was conducted to this room with a black hood over his head. The mock trials were designed, among other things, to gain the confidence of the accused in his supposed defense attorney and thus to elicit a statement from him.

. . . The propriety of many of the

> methods employed to secure statements from the accused is highly questionable, and we conclude, cannot be condoned. The extent to which the use of these methods operated to elicit statements from the accused cannot, in the nature of the situation, be accurately estimated. Sufficient doubt, however, is cast upon the entire proceedings because of these factors to make it unwise, in our opinion, to proceed with the execution of the death sentences which have been confirmed . . ."

Even *The Progressive* magazine, certainly not a fascist publication, printed in February 1948 an article on "American Atrocities in Germany." The article was written by the second member of the board, Colonel Edward L. Van Roden, JAGC-Res., a judge in the 32d Judicial District of Pennsylvania.

Pursuant to Senate Resolution No. 42, the Senate Committee on the Armed Services conducted an investigation of the trial of the "Malmedy Case."

On May 18th, 1948, leave to file a petition for an original writ of habeas corpus was denied by the United States Supreme Court for "want of original jurisdiction."

Another petition read:

> "This petition is directed solely to the abuses in the above entitled proceedings, of those procedural directives of the Commander in Chief, and the spirit and the intention of the program they were designed to implement. These abuses, practiced by certain individuals connected with the present case, were so aggravated as to constitute a denial to the Petitioner of his right to a fair trial and to an adequate opportunity for a hearing and defense. It is for the vindication of these rights, without which no man can be said to have been tried and sentenced in accord with the course and usage of the law—that this petition is filed. . . ."

These words came from a major in the United States Army, acting in performance of his duties as an officer and as a lawyer, thus probably constituting an informed and measured conclusion.

WE HAVE thus far assumed that the defendants in the War Crimes trials had a right to review of their cases. But did they? Article 26 of the Charter annexed to the London Agreement read: "The judgment of the Tribunal shall be final and not subject to review." That Charter provision, however, did not stop 200 odd defendants from trying to get such review. For the most part they were represented by German Lawyers who did not know anything about the American *habeas corpus* writ. What did the Supreme Court do about these petitions?

First of all, it "dodged" the issue by saying that it had "no original jurisdiction" to entertain the writ. Finally, on December 6th, 1948 Justice Jackson, who had been U.S.

Chief Counsel in the first Nuremberg trial and had therefore disqualified himself from participating in the conferences on the various motions, thus causing a tie vote and subsequent denial of the motions, decided to make a statement. He explained that the withholding of his vote would mean the execution of sentences " . . . which half the court tells the world are on so doubtful a legal foundation that they favor some kind of provisional relief and fuller review. The fact such a number of men so placed in the United States are of that opinion would for all time be capitalized in the Orient, if not elsewhere, to impeach the good faith and to discredit the justice of this country, and to comfort its critics and enemies."

The motions were nevertheless denied on December 20th, 1948, and one should note here the significant sidestep the court took: "We are satisfied that the Tribunal sentencing these prisoners is not a tribunal of the United States." In other words: The General who had to set up the Military Tribunal was declared the "agent" (in the legal sense) of the "international" powers who had agreed to conduct war crimes trials. What does this mean? It means that the conduct of such a tribunal is therefore not reviewable by American courts because of "lack of jurisdiction." This shows clearly that "international" propaganda considerations influenced Mr. Justice Jackson to break the tie vote and that "international" considerations played the major role in the Court's final decision to deny these petitioners the traditional writ.

But the Court got itself into trouble by calling the Military Tribunal "international," because now German attorneys defending those tried before United States Military Tribunals perceived the advantages to be gained by pressing that these tribunals were United States and not Allied, or "international" tribunals: "As an American court, it was bound by the American Constitution and could not ignore the rules of law generally established in the United States."

On June 5th, 1950, the Supreme Court was forced to face the issue squarely: Defense counsel had finally succeeded in securing a ruling from the Court of Appeals for the District of Columbia that "if a person has a right to a writ of habeas corpus, he cannot be deprived of the privilege by an omission in a federal jurisdictional statute."

All the fancy footwork about the "international" nature of the Military Tribunals and War Crimes Commissions finally had caught up with the Supreme Court. What did the Court say? "A non-resident enemy alien, especially one who has remained in

the service of the enemy, does not even have qualified access to our courts."

THUS the Supreme Court successfully blocked any effort to have the War Crimes Trials reviewed for reasons which have little to do with sound law or superior notions of justice. The dissenting justice, Mr. Black, seemed to make that point when he wrote: "The Court cannot, and despite its rhetoric on the point does not deny that if they (the defendants) were imprisoned in the United States our courts would clearly have jurisdiction to hear their habeas corpus complaints. Does a prisoner's right to test the legality of a sentence then depend on where the government chooses to imprison him? . . . We ask only whether the Military Tribunal was legally constituted and whether it had jurisdiction to impose punishment for the conduct charged. Such limited habeas corpus review is the right of every citizen of the United States, civilian or soldier . . . Any contention that a similarly limited use of the habeas corpus for these prisoners would somehow give them a preferred position in the law cannot be taken seriously."

The facts presented here, if carefully considered, cannot but answer the question as to whether these trials were acts of "justice" or "revenge."

Nothing Is Impossible!

While my unit was stationed in Hawaii our clothes were sent to a quartermaster company to be laundered. A corporal in our outfit constantly complained about the noticeable shrinkage in his unmentionables. This led to the insertion of an occasional sarcastic note in his laundry bag. The bag would invariably be returned with a jeering note in reply.

One day the corporal found a railroad spike and placed it in his laundry bag with a note tied to it saying, "Let's see you shrink this." When his bag came back there was a carpet tack with a note tied to it saying, "We did!"

—ROBERT A. HEINTZE